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Supreme Court of the United States.

P. H. KIRWAN, as United States Surveyor-General, for the District of Minnesota, and THOMAS H. CROSWELL,

Appellants,

vs.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA A. FLINN and TEMPLE E. DORR,

Appellees.

No. 16

BRIEF IN BEHALF OF THE APPELLEES.

BENTON HANCHETT,
Of Counsel for Appellees.

M. H. STANFORD,
Solicitor and Counsel for Appellees.

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SUPREME COURT

OF THE UNITED STATES.

P. H. KIRWAN, as United States Surveyor-General, for the District of Minnesota, and THOMAS H. CROSWELL,

Appellants,

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SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA A. FLINN and TEMPLE E. DORR,

Appellees.

Brief in Behalf of the Complainants and Appellees.

The lands which are in controversy in this cause are situated in Township 57, North of Range 17 West, in the State of Minnesota, and are described as follows:

Lots 2, 3 and 4, of Section 1; Lots 1, 2 and 3, of Section 2; Lot 2 of Section 3; Lots 1, 3, 5, 6, 7 and 8, of Section 4; Lot 4, and the South West quarter of North West quarter of Section 9; Lots 1, 2, 3 and 4; the South East quarter of

North West quarter, and the North West quarter of South West quarter of Section 10, and Lot 3 of Section 11, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor-General.

The complainants, who are Appellees, derive their title to the lands through mesne conveyances from the patentees to whom said lands were conveyed by patents from the United States, which patents are set out in the Record as follows:

Exhibits I, page 262, J, page 263, K, page 264, P, page 274, Q, page 275, V, page 287, X, page 290, AA, page 296, and AB, page 298.

The descriptions, taken from the patents, are as follows:

Exhibit I, (R. p. 262) "Whereas, * * * the claim of Henry Koecher has been duly established, and duly consummated in conformity to law for the lot numbered two, of section three, and the lot numbered one, of section four, in Township fifty-seven, north of range seventeen, west of the fourth Principal Meridian in Minnesota, containing one hundred and five acres and thirty-five hundredths of an acre, *according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor-General.* Now know ye, that there is therefore granted by the United States unto the said Henry Koecher *the tract of land above described.*"

Exhibit J, (R. p. 263) "Whereas, * * * there has been deposited in the General Land Office Warrant No. 36,351, for eighty acres, in favor of Fitch R. Hunt * * * with evidence that the same has been duly located upon the South East quarter of the North West quarter and the North East quarter of the South West quarter of Section ten, in Township fifty-seven, North of Range seventeen west of

the fourth Principal Meridian in the District of lands subject to sale at Duluth, Minnesota, containing eighty acres, *according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor-General;* the said warrant having been duly assigned to James H. Ruttle, as aforesaid, and to his heirs *the tract of land above described;* to have and to hold the said land with the appurtenances thereof unto the said James H. Ruttle."

Exhibit K, (R. p. 264) "Whereas, James H. Ruttle, of St. Louis County, Minnesota, has deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Duluth, Minnesota, whereby it appears that full payment has been made by the said James H. Ruttle * * * for the lots numbered one and two of section ten, in Township fifty-seven, North of Range seventeen west of the fourth Principal Meridian in Minnesota, containing sixty-eight acres, *according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor-General* * * * Now know ye, that the United States of America * * * have given and granted, and by these presents do give and grant unto the said James H. Ruttle and to his heirs *the said tract above described.*"

All of the other patents convey the lands in the same manner, by reference to the "official plat of the survey of said land returned to the General Land Office by the Surveyor-General."

In the above manner all of the lots are described and conveyed by the number of the lots, and by reference to the official plat of the survey of said lands returned to the General Land Office by the Surveyor-General.

A copy of the plat to which reference is made is Exhibit A appearing in the Record following page 14.

In no other manner are the lots described or identified by the patents than as they appear on this plat.

It will be observed that the plat shows that all the lots extend to and are bounded by Cedar Island Lake.

This lake is as distinctly a boundary of the lots, and made so by the plat, as are any of the lines of the section, or as are any of the subdivision lines of the section made a boundary of the lots.

Cedar Island Lake in fact exists opposite the lots. The meander line of the lake appears on the plat to coincide with the shore of the lake.

The plat represents that such meander line is at the shore of the lake.

In fact the lake is not as large as it is represented to be upon the plat, and therefore the lots, if bounded upon the lake, contain a greater quantity of land than they are described as containing in the patents.

There is no dispute of the title of the complainants to the lots as they are described in the patents.
(R. pp. 103, 104.)

The point in controversy is this, viz.: Do the complainants, under the descriptions in those patents, own the lands to the shore of the lake, or do they own only to a line to be located by reference to the field notes of the survey of Henry S. Howe, Deputy United States Surveyor, which field notes purport to locate a meander line of the lake,—the land between such meander line and the lake being claimed by the defendants as unsurveyed land of the United States.

The claim of the defendants is that no survey was made at all of the township by Henry S. Howe other than a survey of

the exterior lines of the township, and that the field notes of the survey, including the field notes of the meander lines, are false and fictitious.

(See Defendants' Answer, R. p. 37.)

(See Instructions to Defendant Croswell, R. p. 57.)

It is an admitted fact that *there is no evidence upon the ground* that an actual survey was made of the township by Henry S. Howe, from whose field notes the plat of the township was made, beyond running and marking the exterior boundary lines of the township, and that there is no evidence that section lines were ever run by him along or across said township, or that section or corner posts, or quarter posts were ever located or set by him, except a corner post at the north west corner of Section 36, and a quarter post in the western line of Section 36, and that there is no evidence that witness trees were ever blazed or marked by him, and that there is no evidence that any meander line of said lake was ever surveyed by said Howe, or any meander posts, placed by him about said lake, except one where the north line of the township encounters said lake.

(R. pp. 101, 102.)

It is further admitted, "that at divers times from a time soon after the survey was purported to have been made down to the present, competent woodsmen have made examination of the lands in said township, and since the winter of 1893 and 1894, various surveys thereof have been made by competent surveyors, but no monument, section corner, or quarter post, meander monuments, or any blazed lines or trees have ever been found except on the boundary lines of the township, and on the western line of section thirty-six, and at the north west corner thereof; that none of the posts, monuments, lines or witness trees specified in the field notes of Howe have ever been discovered, except as above stated, and that at many

places where they purport to have been established by him, said points are in lakes, then and now deep and permanent, and where the water is upwards of thirty feet in depth."

(R. p. 102.)

It is further admitted that a contract was made by and between the United States and Henry S. Howe, as Deputy Surveyor, dated April 26th, 1876, for the survey of all of the lands in said township fifty-seven, north of Range seventeen west, and that Howe made and filed field notes of a survey of said township, and a plat of the township was made therefrom which was approved by the Surveyor-General of the United States on August 7th, 1876; that said survey and plat of said township were submitted to the Commissioner of the General Land Office of the United States for his approval. That prior to the approval thereof complaint was duly made and filed in the department of the said United States General Land Office questioning the accuracy and good faith of said survey, and requesting that the said department of the General Land Office examine into the same and suspend approval of the said plat pending such examination; and that on the 11th day of June, 1879, the Commissioner of said United States General Land Office denied this application, and thereupon said plat was approved and filed and recorded in the office of the Surveyor-General, and became, and ever since and now is the official Government plat of said township.

(See Bill of Complaint, R. p. 3, and Defendants' Answer, R. p. 37, and R. p. 101.)

It is further admitted, "that prior to the commencement of this suit, the United States had patented, according to the government plat of the Howe survey thereof,—which is the only government plat of said township—all the fractional government lots in said township reported in the field notes returned by said Howe; *and all other lands in said township*,

outside of the meander line of Cedar Island Lake, shown by the field notes and plat of said Howe survey, had then been patented by the government."

(R. p. 103.)

Whatever defects may exist in the plat of the township, and whatever may be the cause of the defects, the Government has made the plat its own, and has issued patents intending to convey the entire of the lands in the township, according to the descriptions of the plat.

There can be no question in the case that it was the purpose and intent of the patents, under which the complainants derived their title, to convey all the lands to the shore of the lake.

POINT I.

The reference in the patents to the plat makes the plat as much a part of the patent as it would be had the plat been incorporated into and made, in fact, a part of the patent itself.

By the plat designating the lots as bounded by the lake, showing the lake to be the boundary of the lots, the effect to be given to the patent is the same as it would be *if the description of the lots in the patent had in express language said that the lots extend to and are bounded by the shore of the lake.* The lake is thus made a designated natural object constituting a boundary of the lots. It is a boundary monument of the lots.

Lincoln vs. Wilder, 29 Me., 169 at 179.
Erskine vs. Moulton, 66 Me., 276 at 280, 281.
Davis vs. Rainsford, 17 Mass., 207 at 211.
Whitman vs. Boston & Maine R. R. Co., 3 Allen, 133 at 139.
Boston Water Power Co. vs. Boston, 127 Mass., 374 at 376.
Morgan vs. Moore, 3 Gray, 319 at 321, 322.

Murdock vs. Chapman, 9 Gray, 156 at 158.
Rodgers vs. Parker, 9 Gray, 445 at 446, 447.
Fox vs. Union Sugar Refinery, 109 Mass., 292 at 296.
Parker vs. Bennett, 11 Allen, 388 at 393.
Masterson vs. Monroe, 105 Cal., 431.
Cragin vs. Powell, 128 U. S., 691 at 696.

In Lincoln vs. Wilder, 29 Me., 169, at page 179, the Court say: "Where land is conveyed according to a plan to which reference is made in the conveyance, it becomes a part of it, as much so as if it were incorporated in the conveyance. This is a well-established rule of construction. The demandant says in his deed, 'said premises being the lot numbered 52 on the plan, etc.,' he makes the plan a part of his deed. The plan bounds the lot on the west by the river, and is to be viewed in the same manner as a deed bounding a grant by a river."

In Erskine vs. Moulton, 66 Me., 276, a parcel of land is conveyed by description which carries the land to the low water mark of the stream. After the description the deed referred to the plan in the following words: "For a more full description, reference is made to a plan made by Asbury Young, November, 1865, (p. 277.)" By the plan the lands were *not* extended to low water mark of the stream, and the plan was held to govern. (Pp. 280-281.)

In Davis vs. Rainsford, 17 Mass., 207, the Court say (p. 211): "When lines are laid down on a map or plan, and are referred to in a deed, the courses, distances and other particulars appearing on such plan, are to be as much regarded as the true description of the land conveyed, as they would be if expressly recited in the deed. This is a familiar rule of construction in all those cases wherein no

other description is given in the title-deed, than the number of the lot on a surveyor's plan of a township, or other large tract of land."

In Whitman vs. Boston & Maine R. R. Co., 3 Allen, 133, the Court say (p. 139) : "On looking at the terms of this grant, it appears that the land conveyed was described as a lot on the canal, and was bounded southwesterly thereby, 'being canal lot number two as laid down on a plan' to which reference is made. Taking this description in connection with the plan, it is clear that the premises conveyed were bounded by the canal, and did not extend beyond it. If there were any doubt of this on the language of the grant, it is manifest from an inspection of the plan, which is to be deemed a part of the description, that the intent was to convey a lot bordering on the line of the canal, and to exclude any land comprehended within the limits of the canal itself."

In Boston Water Power Company vs. Boston, 127 Mass., 374, at page 376, the Court say : "The plan made use of at that sale is referred to in the deeds to the purchasers, and is described as recorded with the Suffolk deeds. It must be considered as making a part of the contract in each case, so far as is necessary to aid in the identification of the lots, and the description of the rights intended to be conveyed. All the particulars appearing on the plan and applicable to these lots are to be regarded as if they had been fully set forth in the deeds."

In Morgan vs. Moore, 3 Gray, 319, at pages 321, 322, the Court say : "Now, it is a well settled rule of construction, that where a plan is referred to in a deed, as containing a description of an estate, the courses, distances, and other particulars, appearing upon the plan, are to be as much regarded, in ascertaining the true description of the estate, and the

intent of the parties in making it, as if they had been expressly recited and enumerated in the deed."

In Murdock vs. Chapman, 9 Gray, 156, land was conveyed which was described in the deed by metes and bounds, and which referred to a plat, and described the lands by the plan as being lots 3, 4, 5 and 6 on said plan. The description by metes and bounds would not include lot number 5. The reference to the plan was held to control the description.

The Court say (p. 158): "By the well settled rule of construction in this commonwealth, when a plan is referred to in a deed, as a part of the description, all the particulars appearing on such plan are to be regarded as if they had been fully set forth in the deed."

In Fox vs. Union Sugar Refinery, 109 Mass., 292, the Court say (p. 296): "Where a plan is referred to in a deed, as containing a description of an estate, the courses, distances and other particulars, appearing upon the plan, are to be as much regarded in ascertaining the true description of the estate, and the intent of the parties in making it, as if they had been expressly recited and enumerated in the deed."

In Parker vs. Bennett, 11 Allen, 388, the Court say (p. 393): "When a plan is referred to as containing a description of an estate, what appears upon the plan is to be as much regarded in ascertaining the true description of the estate, and the intent of the parties in making it as if it was recited in the deed."

In Cragin vs. Powell, 128 U. S., 691, the Court had under consideration the boundaries of land which had been conveyed by patent, by reference to a plat of the survey filed in the United States Land Office for the District, by which plat a call of the description was a bayou.

The Court say (p. 696) : "It is a well settled principle that when lands are granted according to an official plat or survey of such lands, the plat itself, with all its notes, lines, descriptions *and landmarks*, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, *as if such descriptive features were written out upon the face of the deed or the grant itself.*"

In the patents by which these lots in question are conveyed by the United States *there is no description of the lands other than by reference to the plat.*

Under the above authorities, the description by the plat is to have the same effect *as though the language of the patent in terms stated that the lake is a boundary of the lots.*

POINT II.

The patents, by reference to the plat, having described the lands as extending to and bounded by the lake, conveyed all the land within the descriptions, and the United States *is estopped to deny that the lots extend to and are bounded by the lake.*

Thomas vs. Poole, 7 Gray, 83 at 84.
Parker vs. Smith, 17 Mass., 411 at 415.
O'Linda vs. Lothrop, 21 Pick., 292 at 296, 297.
Rodgers vs. Parker, 9 Gray, 445 at 446, 447.
Fox vs. Union Sugar Refinery, 109 Mass., 292 at 295, 296.
Farnsworth vs. Taylor, 9 Gray, 162 at 166.
Stetson vs. Dow, 16 Gray, 372 at 373.
Lunt vs. Holland, 14 Mass., 149 at 150.

In Thomas vs. Poole, 7 Gray, 83, the Court say (p. 84) : "The leading case on this subject, *Parker vs. Smith*, 17 Mass., 413, settled the general principle so often since recog-

nized, that if land be conveyed as bounded upon a way or street, this is not merely a description, but an implied covenant that there is such a way, and the grantor and his heirs are estopped to deny such a way as existing. So also a boundary on a passage way two rods wide, which is to be laid out between the premises and land of A, 'estops the grantor and those claiming under him to deny the existence of the passage way.'"

In Rodgers vs. Parker, 9 Gray, 445 at 446, the Court say: "The sale to the defendant was made by one having the entire estate, and was a sale by public auction of house lots laid out and numbered on a plan then exhibited; said lots being bounded by Hancock Avenue which was also delineated on the plan, which plan was afterwards recorded in the office of registry of deeds. In this state of the facts, the grantor and those who succeed to his title to the remaining land, are estopped from denying that there is such a way."

In Faresworth vs. Taylor, 9 Gray, 162, the Court say (p. 166): "The position taken by the defendants, that where land is conveyed which is situate on a street or way, and reference is made in the deed of conveyance to a plan on which said street is delineated, the plan exhibited at the sale, and subsequently recorded by the grantor in the registry of deeds, is made a part of the deed, and estops the grantor and those claiming under him to deny the existence of the street as delineated on the plan, is well maintained by authority and sound in principle."

In Stetson vs. Dow, 16 Gray, 372, the Court say (p. 373): "It is now well settled that when a grantor conveys land bounding on a street or way, he and his heirs are estopped to deny the existence of such street or way; and the grantee acquires by the deed a perpetual easement or right of pass-

age on, upon and over it, from the full enjoyment of which he can never afterwards be excluded. And this is a right, not only coextensive with the land conveyed, but for the entire distance of the way, as it is then actually laid out or clearly indicated."

Estoppel applies against the United States as it applies under like circumstances against a private person. *As under the above authorities a private person conveying the lands by reference to such plat would be estopped to deny that the land extended to and was bounded by the lake, so are the United States estopped to deny the same facts.*

Lindsey vs. Hawes, 2 Black, 554 at 560.
Woodruff vs. Trapnall, 10 Howard, 190 at 207.
Branson vs. Wirth, 17 Wall., 32 at 42.
Clark vs. United States, 95 U. S., 539 at 544.
Pengra vs. Munz, 29 Fed., 830 at 836.
Hough vs. Buchanan, 27 Fed., 328 at 331.
State of Indiana vs. Milk, 11 Fed., 389, 396, 397.
United States vs. Military Road Co., 41 Fed., 493 at 501.
United States vs. McLaughlin, 30 Fed., 147 at 161, 162.
Commonwealth vs. Philadelphia, &c., Turnpike Co., 153 Pa. St., 47.
State vs. Janesville Water Power Co., 92 Wis., 496.
State of Michigan vs. F. & P. M. R. R. Co., 89 Mich., 481.
State of Michigan vs. Jackson, L. & S. R. Co., 69 Fed., 116 at 120, 121, 123, (Court of Appeals.)
Commonwealth vs. Heirs of Andre, 3 Pick., 224 at 225, 226.
Menard's Heirs vs. Massey, 8 How., 293 at 313, 314.

In Lindsey vs. Hawes, 2 Black, 554, government land was surveyed in the year 1833 by Bennett, the Government Surveyor, whose survey was duly filed in the proper office. In 1839, Thomas Lindsey made application to purchase the land under that survey, claiming a pre-emption right by reason of cultivation and residence, and received from the Receiver

and Register proper certificates stating the receipt of the purchase money, and that, on its presentation to the Commissioner of the General Land Office, he would be entitled to a patent.

About five years after Lindsey's entry, upon a suggestion made to the Commissioner of the General Land Office that there was error in Bennett's survey, the commissioner ordered a new survey to be made of the same lands. The new survey conflicted with the Bennett survey, and under the new survey a patent was issued to David Hawes which covered a portion of the land which had been sold to Thomas Lindsey. The suit was brought by the heirs of Lindsey to quiet their title to the portion of the land claimed by Hawes under his patent.

The opinion of the court sustaining the suit was delivered by Mr. Justice Miller, who states as follows (p. 560): "It is to be remembered that the original survey of Bennett, was the survey of the Government; that it was made in 1833; that the maps, plats, certificates, and field notes were all filed in the proper office; the survey approved, and that for eleven years, the Government had acted upon and recognized it as valid and correct, and above all had sold the land to Lindsay by this its own survey, received the purchase money and given him a patent certificate five years before any suggestion was made of this error. The money thus received by the Government has never been returned, nor do we think it would vary the rights of the parties if it had been actually tendered to him or his heirs. We are of opinion, under these circumstances, that so far as the location of the lines of that quarter section affect the question of the precise locality of Lindsay's residence, as bearing on his right to enter that fraction as a pre-emption, *the Government was bound by the original survey of Bennett.*"

In Woodruff vs. Trapnall, 10 Howard, 190, the Legislature of Arkansas had chartered a banking corporation in which the State was the sole stockholder. The charter provided that the bills and notes of said institution should be received in all payments of debts due to the State. Afterwards a law was passed repealing that clause of the charter.

The question in the case was of the obligation of the State to receive the notes of the Bank after the repealing act had been passed.

In deciding the case, the Court say (p. 207):

"A State can no more impair by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. We naturally look to the action of a sovereign State to be characterized by a more scrupulous regaed to justice, and a higher morality, than belong to the ordinary transactions of individuals. The obligation of the State of Arkansas to receive the notes of the Bank, in payment of its debts, is much stronger than in the above case of individnal guarantee."

In Clark vs. United States, 95 U. S., 539, Clark, as the owner of a vessel, in 1865 made an agreement with an officer in the Quartermaster's Department of the United States for the use of the vessel by the Quartermaster's Department, at the price of $150 a day. The vessel was taken possession of by the Quartermaster's Department, and while in such use was wrecked. The owner brought suit in the Court of Claims to recover for the value of the vessel, and for her use before the wreck occurred.

Defense was made to the claim on the ground that the vessel was previously owned by and in the military possession of the Confederate Government, and that the complainant acquired his title to her about the year 1863, by taking her in

part payment of a claim he held for supplies furnished by him to the Confederate Quartermaster's Department.

In overruling this defense, Mr. Justice Bradley, delivering the opinion of the Court, said (pp. 543, 544):

"The other objection relied on by the government in this case is, that the claimant had no valid title to the steamer as against the United States, having obtained her from the Confederate Government, in 1863, in payment for supplies furnished to the Quartermaster's Department of that government. This objection cannot be sustained. When the contract was made with the claimant, the vessel was in Mexican waters, and not subject to the jurisdiction of the United States. The claimant was applied to for its use. It was agreed that he should be compensated. No question was made about his title, and it is not suggested that he was guilty of any concealment or suppression of the truth in regard to it. Under these circumstances, it would be bad faith on the part of the government, after getting possession of the steamer and getting it within its jurisdiction, under pretense of hiring it of the claimant, to set up that he had no title to it."

In Pengra vs. Munz, 29 Fed., 830, the plaintiff claimed title to land under a grant of the United States to the State of Oregon of land conveyed in the construction of a military road. The grant had been conveyed by the State to the Oregon Central Military Road Company, which by the construction of the road had become entitled to the land under the grant, and had conveyed the land to the plaintiff. The defendant claimed title to the land under the Swamp Land Grant of 1850, which had been extended to the State of Oregon and under which the lands had been selected by the State as swamp lands, the selection having been made after the action had been taken under the grant for the purpose of the construction of the military road.

In deciding the case, the Court say (p. 836):

"The State was the grantee in both these grants. It accepted the land as part of the wagon-road grant, or allowed its grantee or agent to do so. At least there is no evidence that it ever selected this section under the swamp-land grant, and presented it for certification as part thereof. And while this may have been done, it is morally certain that it was not done until after the premises were certified to the grantee of the state under the wagon-road grant, nor until the grant had lapsed, for want of selection, within the time prescribed. The non-action of the state in this matter probably arose from the fact that it was thought best that the land should go to the construction of the wagon-road which was then regarded as a meritorious enterprise. For long after this swamp-land grant was made no interest was taken in it, nor was it generally understood that there was any considerable quantity of land in the state to which it was at all applicable. For 10 years the state took no steps to secure any land under it, preferring, as it appears, to make its selections under the grants for the benefit of roads and schools. The fact that some portions of these selections were damp enough to be called swamp was no objection to them, but often a recommendation; and in my judgment, it would have been well if that policy had been continued. But, be that as it may, in the meantime this land was formally selected and certified to the state as wagon-road land, with its acquiescence, if not active concurrence, and *it is now estopped*, as against the plaintiff, to deny that the premises are included in such grant, or to assert that it acquired them under the swamp-land grant. And if the state is so estopped, so is its grantee, the defendant."

In State of Indiana vs. Milk, 11 Fed., 389, the State sought to recover possession of land. The defendant set up acts by which he claimed the State of Indiana was estopped from recovering the land.

In deciding the case against the State, Judge Gresham uses this language (p. 397):

"Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law that will exempt them from doctrine of estoppel."

In United States vs. Dalles Military Road Co., 41 Fed. 493, suit was brought by the United States under Act of Congress, March 2nd, 1889, to procure a decree of forfeiture of lands granted to the State of Oregon, to aid in the construction of a military road, on the ground that the terms of the grant had not been complied with.

In dismissing the bill, Judge Sawyer uses this language (p. 501): "Whatever is inequitable, as between man and man, in their dealings with each other, should, also be deemed inequitable, as between the United States and those with whom they condescend to deal, under like circumstances; and, I take it, that the same decree is proper in this case, that would have been proper, had a private party been the grantor, and had he by both his positive affirmative action, and his non-action, for so long a time, given purchasers from his grantee so good reason to believe, that he was fully satisfied with the performance of the conditions of the grant."

In United States vs. McLaughlin, 30 Fed., 147, suit was brought by the United States against the Central Pacific Railroad Company, patentee, and its various grantees, to vacate certain patents as having been improperly issued by mistake.

In deciding the case against the United States, Judge Sawyer uses this language (pp. 161, 162):

"Do the principles of equity jurisprudence require, that these patents, in either case, under the peculiar circumstances

surrounding them, should be decreed void and vacated? It does not appear so to us. The interests of all *these* pre-emptioners and purchasers from the government, as well as of the parties holding under the railroad grants, and the interests of public justice, generally require that the practical location of the vague, uncertain, impracticable eastern exterior boundary of the Moquelamos grant of 1855, acted upon by all departments of the government, by the public, and even by the claimant himself, for nearly a quarter of a century, should not now be disturbed—*that the government should be now estopped from alleging that it is, or should be, located elsewhere.* That the law of estoppel, in a proper case, applied to the government, see *Clark vs. U. S., 95; U. S. 539, 544; Branson & Wirth*, 17 Wall, 42; *State vs. Milk*, 11 Fed., Rep., 389, 397, and cases cited."

In Commonwealth vs. Philadelphia &c. Turnpike Co., 153 Pa. St., 47, proceedings were taken in behalf of the State, under *quo warranto* proceedings, to prevent the defendant company from using its road.

In deciding the case against the State, Chief Justice Paxson says: "In England, from whence we derived the great body of common law, and most of our principles in equity, it is well settled that, while time will not run against the crown, yet time, together with other elements, may make up a species of fraud, *and estop even sovereignty from exercising its legal rights.*"

In State of Michigan vs. The Flint & Pere Marquette R. R. Co., 89 Mich., 481, suit was brought to establish the claim of the State to lands which were claimed by the railroad company.

In deciding the case against the State, the Court employs the following language (p. 487): "I deem it necessary to

discuss and determine only the question of estoppel, raised in this case ; for, if the complainant is estopped to now set up title in itself to the lands in controversy, the other questions become unimportant.

That the State, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence, is established by a line of well-adjudicated cases."

In Commonwealth vs. Heirs of Andre, 3 Pick., 224, the Commonwealth had granted a tract of land to Andre, his heirs, and assigns, with warranty. Andre was at that time resident in Boston, but was a subject of the King of France. After the death of Andre, the Attorney General of the State, in pursuance of a resolution of the legislature, brought suit to recover possession of the land from the heirs of Andre, who were also subjects of the King of France, on the ground that the land had escheated to the Commonwealth, by reason of the alienage of Andre and his heirs.

The Court held, Chief Justice Parker delivering the opinion, that the Commonwealth having conveyed the land to the persons defending the suit, as heirs of Andre, to whom, and to his heirs, the grant was made, was estopped against setting up the alienage of those persons.

In Menard's Heirs vs. Massey, 8 Howard, 293, at 313, 314, a grant of land had been made in 1799 by the Lieutenant Governor of the Spanish Province of Louisiana, which grant had been confirmed by act of congress.

To define the location of the grant a survey was made by direction of the Surveyor General under the authority of the act of congress. The Court, by Mr. Justice Catron, in stating the effect of this survey, as between the United States and the claimants of the lands, says (p. 314): "When it was made, and the field notes returned to the surveyor-general's office,

and the description and plat made out in form and approved by the surveyor-general, it was conclusive evidence, as against the United States, that the land granted by the confirmation of congress was the same described and bounded by the survey, unless an appeal was taken by either party, or an opposing claimant, to the commissioner of the general land office. This consideration depends on the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, *they are mutually bound and respectively estopped by it.*"

It is submitted that under the above authorities, the United States, in a suit brought in their behalf, would be estopped to deny that Cedar Island Lake was the boundary of the lots conveyed by the patents.

POINT III.

The descriptions of these fractional lots contained in the patents, being lots as they appear by their numbers, and by their bounderies designated on the plat, and the lake itself being made the boundary, the boundary by the lake thus made governs the description, notwithstanding no courses, distances, nor computed contents correspond with such boundary.

This is clearly decided by the following cases, even though it may be found that no survey of the lots had in fact been made.

Newsome vs. Pryor's Lessee, 7 Wheat., 7 at 9, 10.
McIver's Lessee vs. Walker, 9 Cranch., 173, 179.
Preston's Heirs vs. Bowmar, 6 Wheat, 580, 582.
Higueras vs. U. S., 5 Wall., 827 at 835, 836.
Morrow vs. Whitney, 95 U. S., 551 at 555.
County of St. Clair vs. Lovingston, 23 Wall., 46 at 62, 63.
Murdock vs. Chapman, 9 Gray, 156, 157.

Bishop vs. Morgan, 82 Ill., 351 at 353.
Shufeldt vs. Spaulding, 37 Wis., 662 at 668.
Gove vs. White, 20 Wis., 425, 432.
Graves vs. Fisher, 5 Me., 69.
Horne vs. Smith, 159 U. S., 40.
Niles vs. Cedar Point Club, 175 U. S., 300.

In Newsom vs. Pryors's Lessee, 7 Wheat., 9. 10, the facts are in all respects similar to the case which is before the court, if in fact no survey was made by Howe. The lands were conveyed by patent, described by reference to a survey and plat, when in fact no survey had been made, other than to mark a beginning corner. By the plat the boundary of the lands extended to the crossing of a river. By the courses and distances given the land would fall short of such boundary by a distance of 328 (poles) rods, a distance of a mile and eight rods.

The opinion of the Court was delivered by Chief Justice Marshall, and it was held that it must be considered as if the survey had actually been made, that the plan controlled the description, and the land was conveyed to the opposite side of the river referred to.

The case is decided thus: (the italics are ours.) "The plaintiffs in the court below claimed under the elder patent, to the validity of which there was no objection. Of consequence the only question in the cause was, whether the lines of their grant comprehended the land in contest. The grant was made for 5,000 acres of land, 'lying on both sides of the two main forks of Duck River, beginning, &c., and running thence west, 894 poles, to a white-oak tree; south, 894 poles, to a stake crossing the river; thence east, 894 poles, to a stake; thence north, 894 poles, to the beginning, crossing the south fork.' "

"It is apparent that a survey was not made in fact, but that after marking a beginning corner, the surveyor made out and returned a plat, which he supposed would comprehend the land intended to be acquired. It is now too late to question the validity of grants made on such plats and certificates of survey. From the extraordinary circumstances of the country, they were frequent, and, in consequence of these circumstances, have received the sanction of courts. An immense number of titles believed to be perfectly secure, depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle, cannot be perceived ; and is certainly too great now to be encountered. The patent, therefore, must be considered, as if the survey had been actually made."

"In consequence of returning plats where no actual surveys had been made, and where the country had been very imperfectly explored, the description contained in the patent often varies materially from the actual appearances of the land intended to be acquired. Natural objects are called for in places where they are not to be found ; and the same objects are found where the surveyor did not suppose them to be. In a country of a tolerably regular surface, no considerable inconvenience will result from this circumstance. The course and distance of the patent will satisfy the person claiming under it, and seldom interfere with the rights of others. But in a country where we find considerable watercourses and mountains there must be more difficulty. The surveyor calls for some known object, but totally miscalculates its courses, distances, or both, from some given point which he has made the beginning of his survey ; and there is a variance in the different calls of his survey, and of the patent founded on it. As in this case, the second line is run south 894 poles, to a stake, crossing the river. This distance will not reach the river ; *and must be continued to 1,222 poles, to cross the river.*"

"The distance must be disregarded, and this line so extended as to cross the river, or the distance must control the call for crossing the river."

"These difficulties have occurred frequently, and must be expected to occur frequently where grants are made without an actual survey. Some general rule of construction must be adopted, or the conflicting claims of individuals must remain forever uncertain."

"The Courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle, and have adhered to it. *It is, that the most material and most certain calls shall control those which are less material, and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance. These decisions are founded on two considerations. Generally speaking it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land; and in every case where a natural object is mentioned, it designates the land surveyed had there been an actual survey, much more certainly than course and distance can designate it.* In this case, for example, the Surveyor says that he has run south 894 poles, to a stake crossing the river. Now, it is much more probable that he should err in the distance, than in the fact of crossing the river. The conclusion, therefore, had an actual survey been made, would be, that the line did cross the river."

"The general effect of this principle undoubtedly is, that the purchaser acquires more land than is expressed in his grant, and more than he has paid for. Where this has been thought an object worthy of legislative attention, provision has been made for it. Courts cannot now shake a principle so long settled, and so generally acknowledged."

"In this case, the counsel for the defendant in the court below seems to have admitted the rule, but to deny its application to this case. He founds his application to the Court on a supposed distinction between a call to stop at a river, and a call to cross a river." * * * * "We can perceive no sound reason for the distinction between a call for a river at the end of a line, and for a river in the course of a line. There is as much reason in the one case for supposing the Surveyor intended the line should cross the river, or, in case of actual survey, for supposing he did cross the river, as in the other, for supposing an intention to stop at the river, or an actual termination of the line at the river."

"Whether the motives for the call were that the acquisition of the land on the river was an object with the purchaser, or that the call for the river conduced more certainly to the designation of the land intended to be acquired, the motives for considering it as the controlling call in the patent, to which distance must be subordinate, seem to be precisely the same whether the call be to cross the river, or to terminate at it."

The above case emphasizes the fact that where a stream is made a boundary, it is the particular intention of the purchaser to acquire the land lying on the stream called for by the boundary, as being more valuable than other land.

The evidence is clear and undisputed in the case at bar that the complainants purchased the land in controversy with particular reference to the fact that it bordered upon the lake.

They purchased the land for the timber and with reference to the particular facilities which that lake furnished for the operations of lumbering, for storage, and transportation of he timber.
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Mr. Simon J. Murphy, who purchased the lands, and conveyed an undivided one-sixth to each of the other complainants, Robinson, Dorr and Flinn. testifies as follows (R. p. 107):

"I purchased these lands for their pine timber, and originally took the title in my own name, intending to lumber the timber in the two towns above described into Ely Lake, (Cedar Island Lake) in the usual manner of lumbering by water. At that time there were no railroads contemplated in that locality, and I bought the lands around Ely Lake to facilitate the lumbering operations of this surrounding tract of pine timber, in the usual course of business, without any knowledge of any special excess in any of the descriptions. * * * *When I purchased these lands around Ely Lake I relied upon the plats and government descriptions, that they were bounded by the lake.* * * * *I took the report and examination of my woodsmen, relying on the government plat that the lands were bounded by the lake.* I made no examination of the lands personally. * * * The object and basis of said purchase of the lands bordering on Ely Lake was their value for the timber which stood upon them, *and the riparian rights which said lands bordering on Ely Lake possessed for the purpose of flooding said lake for a reservoir, and holding ground in case of fire, and banking ground for the lumbering of said timber.*"

Mr. Elisha H. Flinn testifies (R. p. 105):

"We purchased those lands for the pine timber, *and also for the lake frontage*, we have a large amount of timber just north in township 58—17, and at that time considered that as the only outlet for the timber. The purchase of the land in Section 11—57—17, was largely for the outlet, as we supposed, of the lake; also, the timber on land in the western part of the lake in 9 was purchased to control that portion in case we should dam the lake as a reservoir."

Mr. George Robinson testifies (R. p. 114):

"The features presented to us in making these purchases were, 1st. The amount of timber, of which we secured in

this purchase some 43,000,000 feet, lying tributary to Cedar Island Lake. 2nd. *The value of the boundaries on that lake to us in lumbering the timber*, as at that time it appeared that this was the only outlet for this whole tract of timber."

In the case of County of St. Clair vs. Lovingston, 23 Wall., 46, the above case of Newsom vs. Pryor's Lessee was cited, and its statement of law was adopted, the Court using this language (p. 62): "It is a universal rule that course and distance yield to natural and ascertained objects. A call for a natural object, as a river, a spring, or even a marked line, will control both course and distance. Artificial and natural objects called for, have the same effect." * * * (p. 63), "*Where a survey or patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract.*"

In McIver's Lessee vs. Walker, 9 Cranch, 173, 179, land was granted by patent from the State of North Carolina, in which courses and distances were given, *and a plat was annexed.* Excepting the location of one corner, "*no survey of the land was ever made.*" By the plat a creek called Crow Creek ran through the land. The lines run *by the courses and distances* called for in the patent would not include Crow Creek.

Chief Justice Marshall, delivering the opinion of the Court, says (pp. 178, 179): "It is undoubtedly the practice of surveyors, and the practice was proved in this cause, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle

that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently, if marked trees and marked corners be found conformably to the calls of the patent, *or if water courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects.* The reason of the rule is that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances, are more probable and more frequent, than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated and accurately described. Had the survey in this case been actually made, and the lines had called to cross Crow Creek, the courses and distances might have been precisely what they are, it might have been impracticable to find corner or other marked trees, and yet the land must have been so surveyed as to include Crow Creek. The call in the lines of the patent, to cross Crow Creek, would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause."

"That the land should not be described as lying on both sides of Crow Creek, nor the lines call for crossing that creek, are such extraordinary omissions as to create considerable doubt with the Court in deciding whether there is any other description given in the patent, of sufficient strength to control the call for course and distance."

"The majority of the Court is of opinion that there is such a description. The patent closes its description of the land granted by a reference to the plat, which is annexed."

"The laws of the State require this annexation. In this plat, thus annexed to the patent, and thus referred to as

describing the land granted, Crow Creek is laid down as passing through the tract. Every person having knowledge of the grant, would also have knowledge of the plat, and would, by that plat, be instructed that the lands lay on both sides of the creek ; there would be nothing to lead to a different conclusion, but a difference of about five degrees in the course, should he run out the full chain of surveys, in order to find the beginning of No. 12 ; and he would know that such an error in the course would be corrected by such a great natural object as a creek laid down by the surveyor in the middle of his plat."

In Preston's Heirs vs. Bowmar, 6 Wheat., 580, the Court, by Justice Story, uses this language (p. 582): "It may be laid down as an universal rule that course and distance yield *to natural and ascertained objects*. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one or the other."

In Higueras vs. United States, 5 Wall., 827, Mr. Justice Clifford, delivering the opinion of the Court, says (pp. 835, 836,): "But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as indentifying the land. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings."

In Morrow vs. Whitney, 95 U. S., 551, Mr. Justice Field, delivering the opinion of the Court, uses this language (p. 555): "Metes and bounds in the description of premises

control distances and quantities when there is any inconsistency between them. This is a familiar rule, and is founded upon the principle that those particulars are to be regarded in which error is least likely to occur."

In Bishop vs. Morgan, 82 Ill., 351, the Court say (p. 353): "Quantity in the description of land is never allowed to control courses, distances, monuments, or natural landmarks such as creeks, rivers, ponds, or lakes."

In Shufeldt vs. Spaulding, 37 Wis., 662, Justice Lyon, delivering the opinion of the Court (p. 668) uses the following language: "Were authorities necessary to sustain principles which, if not elementary, are yet well settled in law, the numerous cases cited by counsel for the defendants abundantly show that when a plat is referred to in a deed as a part of the description of lands conveyed, *such plat becomes an essential part of the description itself, and that courses, distances, quantities and measurements must yield to, and are controlled by, natural or fixed landmarks.*"

The cases of Horne vs. Smith, 159 U. S., 40, and Niles vs. Cedar Point Club, 175 U. S., 300, have been cited by the defendants, as being in conflict with the decisions in the foregoing citations.

It is submitted that they are, on the contrary, in entire harmony with them.

In Horne vs. Smith, 159 U. S., 40, the patent conveyed fractional Lot 7, of Section 23, and Lots 1 and 2 of Section 26, containing 170 acres, according to the official plat of the survey of said lands. The plat showed the sections were fractional, bordering on Indian River. On the plat a

meander line runs through the section from north to south, the Indian River being on the west thereof.

Along the course of this meander line, as shown on the plat, runs, *according to the testimony*, a bayou or savannah opening into Indian River, and west of this bayou, and between it and the main waters of the river, is a body of land extending the width or distance of a mile, or a mile and a quarter, and amounting to about 600 acres.

After stating that official surveys are not open to collateral attacks, and that a meander line is not a line of boundary, but one designed to point out the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of lands in the fraction which is to be paid for by the purchaser, and that metes and bounds in the description of premises control distance and quantity, the Court, by Mr. Justice Brewer, says (p. 43): "But the question in this case is whether the boundary of these lots is the bayou, or the main body of the river. *That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey be questioned*, but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river is evident from these facts."

Here is a distinct declaration that the land conveyed by the patent extends to the water line shown on the plat, and there appearing by the evidence to be two water lines, it became a question of identifying which of the two water lines are the lines indicated by the plat; the court points out two facts from the evidence by which it appeared that the water line of the bayou was the water line shown on the plat, and adds, at page 46, as follows: "So in the case before us, obviously the surveyors surveyed only this bayou, *and called that the river*. The plaintiff has no right to challenge the correctness of their action, or claim that the bayou was not Indian River, or a proper water line upon which to bound the lots."

It is the inevitable result of the decision, that if there had been no water line of the bayou, or savannah, between the meander line as located by course and distance and the main river, the main river would have been held to be the west boundary of the land conveyed by the patent, because the plat called for the water line as a boundary, and such boundary could not be questioned or controlled by distance or quantity.

In Niles vs. Cedar Point Club, 175 U. S., 300, the lands were conveyed as fractional parts of sections, according to the official plat of the survey.

The field notes and plat showed for the northerly boundary of the land a meander line, and beyond such line there was described, on the plat, territory designated on the plat as "Flag Marsh," and "impassable marsh and water." The north line of the land was also actually surveyed and marked as shown by the field notes. The plat and marginal field notes also showed that the southerly edge of the "flag marsh" or "impassable marsh and water" was surveyed, and that the lines of the fractional sections southerly of said marsh and water were indentical with the southerly edge of the marsh.

A copy of the plat appears in the report of the case in the Court of Appeals, 85 Fed., p. 47, by which it plainly appears that the boundary of the fraction was intended to be the south line of the marsh.

Justice Brewer, delivering the opinion of the Court, says (pp. 305, 306): "The meander line run by surveyor Rice along the northern borders of the tracts patented to Margaret Bailey may not have been strictly a line of boundary, *Railroad Company vs. Schurmeier*, 7 Wall., 272; *Hardin vs. Jordan*, 140 U. S., 371, 380; *Horne vs. Smith*, 159 U. S., 40; but it indicated that there was something which had stopped the survey, which limited the area of the land which the United States was proposing to convey, and left to subsequent

measurements the actual determination of the line of separation between the land conveyed and that which the government did not propose to convey.

Generally, these meandered lines are lines which course the banks of navigable streams or other navigable waters. Hence, it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this "marsh" as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field notes, *and showed the limits of the tracts which were for sale.* The patents referring in terms to the survey and plat, clearly disclose that the Government was not intending to and did not convey any land which was a part of the marsh."

By the plat in the case which is now before the Court, *the meander line is fixed upon the shore of the lake, and the lake is delineated and named on the plat.*

The intention plainly expressed by the patent and plat is that the meander line and shore of the lake coincide, and that the lake itself is the boundary of the land conveyed.

In this manner the lake is made the boundary of the land within the decisions in *Horne vs. Smith*, and *Niles vs. Cedar Point Club, because the plat shows that the lake is intended as the boundary.*

POINT IV.

The defendants have made the contention in this case that a patent of unsurveyed lands conveys no title, and that, therefore, no title passed from the United States to the lands in controversy, because it was not, in fact, surveyed by Deputy Surveyor, Henry S. Howe, and cite to sustain this position the expression of the court in the case of Horne vs. Smith, 159 U. S., 40.

That case does not hold, as claimed by defendants' counsel, that land which is not surveyed cannot pass by patent.

In answer to the claim made in that case, that the land which was unsurveyed, lying between the bayou and the main river passed by the conveyance of the patent of the land which was surveyed up to the bayou, the Court say: "Although is was unsurveyed it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."

The court was speaking of the particular patent in that case, and, to the claim set up made answer that a patent conveying land which is surveyed does not carry with it, in the character of an appurtenance, land which is unsurveyed.

In addition, the cases above cited to the contrary of this position of the defendants (viz: *Newsom vs. Prior's Lessee*, 7 Wheat, and *McIver's Lessee vs. Walker*, 9 Cranch, 173) (in which patents conveyed lands not in fact surveyed) in the recent case of *Mitchell vs. Smale*, 140 U. S., 406, the patent conveyed the south west fractional quarter of fractional section 20, which the plat of the survey showed as bordering on and bounded by a lake. A strip or tongue of land extended beyond the meander line into the lake, which strip or tongue of land formed the subject of controversy. The quantity of land specified in the patent, which was dated March 1st, 1850, was 4.53 acres. In 1874, the Commissioner of the General Land Office caused the land outside of the meander line to be surveyed, and upon such survey a patent was issued for the land in controversy, according to such survey; (pages 411, 412.) It appears by the dissenting opinion of the court that the strip or tongue of land contained 25 acres (p. 415.)

The court held that the land in dispute was included in the first patent, which conveyed the fractional quarter of the section by the description of the plat as bordering upon and bounded by the lake, saying:

"In conclusion, our view of this part of the case is that the patent to DeWitt (the first patent) conveyed, and the plaintiff is entitled to, all of the fractional S W quarter of Section 20, from its northern boundary line extending southwardly to the actual water line of the lake, wherever that may be, with the riparian rights incident to such position."

The case of Railroad Co. vs. Schurmeier, 7 Wall., 272, is of like character upon this point. In that case the land was conveyed by patent, which was fractional, and appeared by the official plat to border upon the Mississippi River. The meander line upon the plat ran along the main line of the shore. Between that line and the main channel of the river was a parcel of land composed of a slough or bar, and beyond the slough or bar an island. "In the goverment survey no mention of or reference to this bar, or island, was in any way made in the field notes, plat or map." After the fraction had been patented, the space occupied by this bar and island was caused to be surveyed on the part of the government, and was platted and mapped, and was claimed under a land grant from the goverment.

It was held that these premises passed by the patent, on the ground that by the official plat upon which the patent was issued, the river and not the meander line was made the boundary. *From the evidence in the case, these premises had not in fact been surveyed or included in the survey upon which the patent issued; they were not included in the quantity of land specified in the patent, and did not appear by the field notes to have been included within the survey. They were in quantity more than five times the amount described in the patent.*

But the contention of the defendants is *that not any of the lands in said township 57 north, of range 17 west, were surveyed by Deputy Surveyor Howe.*

The claim is that only the exterior lines of the township were surveyed, and that the field notes of the survey of the sections and parts of sections were fictitious and false, and that the plat of the township was made upon such fictitious and false field notes.

(See Defendant's Answer, p. 37, paragraph II.)

If the contention of the defendant is valid, it would follow that the title to the entire of the lands in the township is in the United States, and also that the complainants got nothing under the patents under which they derived their title, *notwithstanding the defendants concede that the complainants have title to that portion of the lands described in the patents which is not included between the alleged meander line and the shore of the lake.* (See Defendant's Answer, pp. 37, 38, Paragraph III, and the Statement of Admitted Facts, p. 103, Paragraph 9,) where it is also admitted that the United States had, prior to the commencement of this suit, patented "all the fractional government lots in said township reported in the field notes returned by said Howe ; and all other lands in said township, outside of the meander line of Cedar Island Lake, shown by the field notes and plat of said Howe survey, *had then been patented by the government.*"

It would seem that there could be no serious contention that the title to the land in controversy did not pass by the patents, if those lands were in fact included within the descriptions contained in the patents, and it was the intention of the patents to convey such lands.

POINT V.

The patents having included the lands in controversy *within the descriptions of the lands conveyed*, the validity of the patents can not be questioned in this suit.

1st. If there was mistake or fraud in the issue of the patents, it can be corrected only by a suit brought by the United States, which shall set forth the facts which constitute the basis or ground for such correction.

The survey of the public lands is vested in the land department, and it is within the jurisdiction of that department *to determine when the lands have been properly surveyed, so that a patent may be issued for them.*

The action of the land department upon this subject is judicial, and is "unassailable, except by a direct proceeding for its correction or annulment."

Smelting Co. vs. Kent, 104 U. S., 636 at 640.
United States vs. Minor, 114 U. S., 233 at 241, 243.
Moffat vs. United States, 112 U. S., 24 at 30.
United States vs. Schurz, 102 U. S., 378 at 396.
United States vs. Stone, 2 Wall, 525 at 535.
Erhardt vs. Hogaboom, 115 U. S., 67.
Johnson vs. Towsley, 13 Wall., 72 at 83.
Noble vs. Union River Logging R. R. 147 U. S., 165 at 175.
Bishop of Nesqually vs. Gibbon, 158 U. S., 155 at 166, 167.

To assail these patents on the ground of fraud, or to correct them in respect to the lands in controversy, the suit would have to be instituted by the United States, since the controversy would be between them and the complainants, no other parties having obtained any claim to the lands from the United States.

United States vs. San Jacinto Tin Co., 125 U. S., 273.

The complainants can not bring suit against the United States in this court, or elsewhere, to establish the complainants' title to the lands.

They must rest upon the patents for their title until the United States see fit to attack the patents.

United States vs. Schurz, 102 U. S., 378 at 404.

The United States have not appeared in this suit, and the court had no jurisdiction to bring them into the case, and no decree which may be made will be of any effect against the United States.

The attack upon the validity of the patents by the defense in this suit is a collateral attack, and is not available to the defense.

2nd. In the suit instituted by the United States, to avoid or correct the patent on the ground of the alleged false character of the field notes and plat, the complainants would have the right to set up as their defence an estoppel against the United States, arising from the fact that the attention of the Land Department was called to the character of the survey, and had an opportunity to investigate and determine its validity, and after its attention had been so called, approved the survey and plat, thereby adjudging that they were properly made; that the plat had been acted upon to the extent that the entire of the lands in the township had been conveyed upon the basis of said field notes and plat, and that the titles thus conveyed had been dealt with through numerous and successive sales, and the complainants had obtained their title to the lands in controversy through mesne conveyances made after the issue of the patents, and that these transactions have gone on through a series of years without any question having been raised on the part of the government.

The authorities above cited, in division II of this brief, establish that the defense of estoppel would be available in such suit to the complainants.

3d. The complainants would also be in position to defend against the United States in such suit upon the ground of their being *bona fide* purchasers of the lands, and in such suit the United States would be required by their pleading to state clearly the facts upon which the charge of fraud or mistake was based, and the burden would be upon them to sustain the charge by clear and convincing proofs, even though to do so would require the proof of the negative. A preponderance of the evidence merely would not sustain it.

Maxwell Land Grant Case, 121 U. S., 325 at 379, 381.
Colorado Coal Co. vs. United States, 123 U. S., 307 at 313, 314.
United States vs. Burlington, &c., R. R. Co., 98 U S., 334 at 342.
United States vs. California, &c., Land Co., 148 U. S., 31 at 40.
United States vs. Winona, &c., R. R. Co., 165 U. S., 463 at 478.
Same case in Court of Appeals, 67 Fed., 948 at 960.

In Maxwell Land Grant Case, 121 U. S., at 379, 381, this statement of the law is made, and is repeated in Colorado Coal Co., vs. United States, 123 U. S., 307 at 316, 317, viz: "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which an instrument may be avoided. * * * We take the general

doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cnn not be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the case cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal? *In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof.* It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and as in this case, under the seal and signature of the President of the United States, himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who choses to attack them in a court of justice; but it should be well underderstood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

The evidence that the complainants are *bona fide* purchasers, through mesne conveyances from the patentees, of the lands in controversy in this case, is fully set forth in division III of the brief of Mr. M. H. Stanford, to which

reference is made, and that evidence is entirely uncontradicted, See, also, testimony of the complainants, Rec., pp. 105, 107, 111, 130.

The evidence in the case in regard to the character of the survey is in the statement of admitted facts.

There is no evidence *upon the ground* that any actual survey of said township 57 was ever made by said Howe, as required by his said contract, or by the rules and regulations of the General Land Office, and there is no evidence that section lines were ever run by him along or across said township.

(R., p. 101, folio 302.)

It is not conceded in the case that no survey of the township was made, or that the field notes or plat are false or fictitious, or that they are in any sense fraudulent.

POINT VI.

The jurisdiction of the court to enjoin the acts of the defendants in making a survey of the lands.

1st. The survey is made under the contract between the defendant Kirwan and the defendant Croswell, under the direction of the Commissioner of the General Land Office, *with the object and purpose of filing the field notes and a plat of the survey in the United States Land Offices, so that the lands in controversy may be treated as government lands, open for homestead or other claims, or for purchase, under the laws governing the disposition of the government lands.*

(Exhibit A, p. 42, and Exhibit C, p. 51, of Defendants' Answer, and the agreed statement of facts, p. 104, folio 311).

These proceedings of survey, field notes, and plat, will constitute a cloud upon the complainants' title to the land.

The survey is the first step taken for the creation of a cloud.

Under the general equity powers of the Federal courts, they have jurisdiction to quiet title to lands in favor of the party in possession, having the title, against a party not in possession, who sets up a claim to the land which constitutes a cloud upon the possessors' title.

Peirsoll vs. Elliott, 6 Pet., 95 at 98.
McConihay vs. Wright, 121 U. S., 201 at 205, 206.
Frost vs. Spitley, 121 U. S., 552 at 556.
United States vs. Wilson, 118 U. S., 86 at 89.

The reason why the general jurisdiction of courts of equity are limited to cases in which the complainants are in possession of the lands is, that, if not in possession they have an adequate remedy at law by ejectment; the further reason applicable to the Federal courts is that the right to trial by jury is preserved in those courts in all cases in which the conditions are such that the matter in controversy may be tried in a suit at law by a jury.

In those states where, by statute, a right is given to a party to maintain a suit in equity to quiet title to land owned by him, which is vacant or unoccupied, that right may be enforced in the Federal courts. The right is held to be the creation, by statute, of an equitable right, which right, by reason of the defendant not being in possession, can not

be tried in an action at law; there is therefore no infringement in such case of the right to trial by jury.

Clark vs. Smith, 13 Pet., 195.
Holland vs. Challen, 110 U. S., 15 at 20 to 25.
Reynolds vs. Crawfordsville Bank, 112 U. S., 405 at 410, 411.
United States vs. Wilson, 118 U. S., 86 at 89.
Rich vs. Braxton, 158 U. S., 375 at 405.
Dick vs. Foraker, 155 U. S., 404 at 414, 415
Greeley vs. Lowe, 155 U. S., 58 at 75.
Cowley vs. Northern Pac. R. R. Co., 159 U. S., 569 at 582, 583.
Smyth vs. Ames, 169 U. S., 466 at 517.

In Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill was filed in equtty to quiet title under the statute of the State of Indiana.

The bill averred a claim set up by the defendant under a deed which was void on its face. In sustaining the suit, the Court say (pp. 410, 411, 412): "While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not 'cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the court sits to ascertain what constitutes a cloud upon the title, and what the State laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove. This was expressly held in the case of *Clark vs. Smith*, 13 Pet., 195, 203, where it was said by this Court: 'Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature.'"

"The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is

such a cloud upon the title as will support a suit to remove it. § 1070 Rev. Stat. of Indiana, 1881, provides as fnllows: 'An action may be brought by any person, either in or out of possession, or by anyone having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title.' "

"This act confers upon any one, against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action of the courts. * * * The question whether, under such a statute as that of Indiana and under the facts stated, the Circuit Court had jurisdiction to render the decree complained of, has been, in effect, decided in the affirmative by this court in the case of *Holland vs. Challen*, 110 U. S., 15."

"In that case a statute of Nebraska was under review, which provided that 'an action may be brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate, against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting the title.' The Court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and, in most cases, that his title should be established at law or founded on undisputed evidence or long-continued possession."

"If the equity courts of the United States in Nebraska could dispense with these well-established rules of equity, and administer the rights conferred by this statute, it is not open to question that, in this case, the Circuit Court could disregard a similar rule, and entertain jurisdiction of the appel-

lee's case, and accord to him the rights conferred by the statute law, even though the deed under which the appellant claimed was void on its face."

"As the same statute authorizes the court to take cognizance of the case even when the title of defendant amounts to more than a mere cloud, and applied in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support."

The statutes of the State of Minnesota provide as follows:

"Sec. 2. *Action to Determine Adverse Claims.* An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien, or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and of the rights of the parties, respectively." St. Minn. 1878, c. 75, § 2, p. 814.

It will be observed that the statute of Minnesota is substantially the same as the statute of Indiana, referred to in the case of Reynolds vs. Crawfordsville Bank.

It is clear that, under this statute, the Circuit Court in which this suit was brought, sitting in Minnesota has jurisdiction to remove the cloud from the complainants' title to the lands in controversy, which lands, in respect to the parties to this suit, are vacant and unoccupied.

2nd. Where courts in equity have jurisdiction to remove a cloud from title to lands, they have jurisdiction to prevent, by

injunction, the proceedings for the creation of a cloud, and suit in any such case is in the character of a bill *quia timet*.

1 High on Injunctions, Sec. 372, (2nd Ed.)
3 Pomeroy Eq. J., Sec. 1345 and 1398, note.
1 Story Eq. J., Sec. 700.
Petit vs. Shephard, 5 Paige, 493 at 501, 502.
Oakley vs. The Trustees of Williamsburgh, 6 Paige, 262 at 265.
O'Hare vs. Downing, 130 Mass., 16 at 19.
Peirsoll vs. Elliott, 6 Pet., ~~96~~ 95
Sharon vs. Tucker, 144 U. S., 533 at 544, 545, 546, 547.
Briggs vs. French, 1 Sumn., 504.
Union Pac. R. Co. vs. Cheyenne, 113 U. S., 516 at 526, 527.

1 High on Injunctions, Sec. 372 (2nd Ed.) says as follows: "The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity, recognized by all the authorities, and founded upon the clearest principles of right and justice. The jurisdiction by injunction to prevent a cloud upon title is closely analogous to the well-settled jurisdiction of courts of chancery for the removal of cloud upon title; and the reasoning which supports the jurisdiction in the latter case would seem to apply with equal if not greater force in the former. It seems, therefore, to follow as a necessary consequence that if the aid of equity may be invoked to remove a cloud upon title to realty, it may with equal propriety be exerted to enjoin such illegal acts as will necessarily result in a clouded title."

In Petit vs. Shepherd, 5 Paige, 493, a bill was filed to prevent the sale of land upon execution. In sustaining the bill, the Chancellor uses the following language (pp. 501, 502): "The jurisdiction of this court to set aside deeds and other legal instruments, which are a cloud upon the title to real estate, and to order them to be delivered up and cancelled, ap-

pears to be now fully established. * * * And if a court of chancery would have jurisdiction to set aside the sheriff's deed which might be given on a sale, and to order the same to be delivered up and cancelled, as forming an improper cloud upon the complainant's title to his farm, it seems to follow, as a necessary consequence, that the court may interpose its aid to prevent such a shade from being cast upon the title when the defendant evinces a fixed determination to proceed with the sale."

In Oakley vs. The Trustees of Williamsburgh, 6 Paige, 262, a bill was filed to enjoin the Trustees of the village from proceeding to cut down and alter the grade of a street which had been once regularly graded, by which proceeding a cloud would be cast upon the complainant's title to real estate.

In sustaining the bill, the Chancellor says (p. 265): "As a prudent man would not be likely to buy a city or village lot for the purpose of building thereon, and pay the full value of the lot, while a cloud like this was hanging over the title, which might thereafter subject him to litigation if not to actual loss of the property. And as this court sometimes exercises its jurisdiction for the purpose of removing a cloud from the complainant's title to real estate, it may also, in a proper case, interpose its authority to prevent the illegal act from which such a cloud must necessarily arise."

In O'Hare vs. Downing, 130 Mass., 16, a bill was filed to prevent a levy and sale under execution.

In deciding the case, Chief Justice Gray uses this language (p. 19):

"A court of chancery will restrain by injunction a threatened levy of execution upon real estate which is not legally subject to such levy, and thus prevent a cloud upon the title,

without compelling the owner of the land to wait until the levy has been completed, and then admit himself to be disseised, in order to maintain a writ of entry."

In Briggs vs. French, 1 Sumn., 504, a bill was filed to quiet title against an attachment and levy made by the defendant, by connivance with his debtor, upon lands sold by the latter to the plaintiff before the deed to the plaintiff was recorded. The bill prayed an injunction to prevent the defendant from selling or conveying the land.

Upon demurrer filed against the bill, Circuit Judge Story says: "I am very clear that the demurrer must be overruled. This is a case of relief sought against a meditated fraud to the injury of the plaintiff which throws a cloud over his title, and which he has a right to have removed."

The right to maintain suit and prevent the creation of a cloud upon the title in case of vacant or unoccupied lands is clearly within the intent and purpose of the statute of Minnesota, and would be enforced in the courts of that state.

For like reason the same right will be enforced in the Federal courts sitting in Minnesota. See Reynolds vs. Crawfordsville Bank, 112 U. S., 410, cited above.

But the jurisdiction of the courts, either State or Federal, does not depend in such case upon the state statute. Remedy to prevent the wrong or injury threatened or intended by the proceedings to create a cloud upon the title exists in equity, because the only effective remedy is by injunction to stay the proceedings.

The right to trial by jury is not invaded, since there is no opportunity at law to try the controversy.

3rd. In order that the complainants be remitted to their remedy at law, it must appear that such remedy is plain and adequate in the sense that it is "as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity," and the circumstances of the case must determine whether there is such remedy at law.

Boyce vs. Grundy, 3 Pet., 210 at 215.
Watson vs. Sutherland, 5 Wall., 74 at 78.
Payne vs. Hook, 7 Wall., 425 at 430.
United States vs. Union Pac. R. R. Co., 160 U. S., 1 at 51.
Oelrichs vs. Spain, 15 Wall., 211 at 228.
McConihay vs. Wright, 121 U. S., 201 at 205, 206.
Holland vs. Challen, 110 U. S., 15 at 24.

In Holland vs. Challen, 110 U. S., 15, Mr. Justice Field, delivering the opinion of the Court, says (p. 24): "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of snch claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity."

If the proceedings sought to be enjoined in this case are allowed to be completed the inevitable result will be various claims made for the lands as government lands. The very object of the survey is to open lands to such claimants, and in order that the complainants defend and maintain their title a multiplicity of suits will be the result.

No action at law is adequate to the complainant's protection.

Under these conditions the Court will enjoin the acts of the defendants to prevent a multiplicity of suits.

Pomeroy Eq. J., Sec. 243, 245, 267, 268.
Livingston vs. Livingston, 6 John. Chy., 497 at 500.
De Forest vs. Thompson, 40 Fed., 375 at 378.
(Opinion by Judge Jackson, Mr. Justice Harlan concurring.)
Osborne vs. Wisconsin Cent. R. Co., 43 Fed., 824 at 827.
(Opinion by Mr. Justice Harlan.)
Crews vs. Burcham, 1 Black, 352 at 358.
Louisville, &c., R. Co. vs. Ohio, &c., Co., 57 Fed., 42 at 45, 46.
New York, &c., R. Co. vs. Schuyler, 17 N. Y., 592.
Board of Supervisors vs. Deyoe, 77 N. Y., ~~217.~~ 219

4th. Complainant's evidence shows that to make the intended survey of the lands there would be necessarily cut down a considerable quantity of the pine timber standing upon the lands, and by the cutting of such timber, the remainder of the valuable pine timber would be exposed to destruction by fire. An irreparable injury is threatened.
(R. pp. 170, 162.)

It is an undisputed fact that the chief value of the lands in controversy consists in the pine timber standing upon them.

It is a fact of common knowledge that the felling of timber in the pine forests in the northern states is a source of special and great danger to the *remaining* pine timber standing upon the lands. Fires are easily kindled, and there is constant likelihood of their being kindled, in the dry tops and refuse of the fallen trees; having gained force from the quantity of refuse the fires spread rapidly and for long distances. The standing timber is not destroyed by being burned up, but the heat about the roots of the trees kills the trees and destroys their value.

The cutting of the timber by the defendants will not be confined to one place, but will be along the different lines

running through the forests upon which the survey is made. In this manner an exposure to the danger of fire will be made to large portions of the lands.

The court has jurisdiction, by injunction, to prevent the cutting of timber and the threatened danger of its destruction.

Livingston vs. Livingston, 6 John. Chy., 497 at 499, 500.
Wilson vs. City of Mineral Point, 39 Wis., 160 at 163, 164.
Butman vs. James, 34 Minn., 547.
Smith vs. Roc, 59 Vt., 232.
West Point Iron Co. vs. Reymert, 45 N. Y., 703, 705.
Camp vs. Dixon, Mitchell & Co., 112 Ga., 872.
Erhardt vs. Boaro, 113 U. S., 537 at 539.
North Pac. R. R. Co. vs. Hussey, 61 Fed., 231 at 235, (Ct. of Appeals.)
Oolagah Coal Co. vs. McCaleb, 68 Fed., 86 at 89, (Ct. of Appeals.)
Buskirk vs. King, 72 Fed., 22 at 25, (Ct. of Appeals.)
Dimick vs. Shaw, 94 Fed., 266 at 268, (Ct. of Appeals.)

5th. The fact that the defendants are acting under the direction of the Land Department does not deprive the court of jurisdiction to restrain acts done by them which are injurious to the complainants, and which are unlawful acts.

The title of the United States to the lands in controversy having been conveyed by the patents under which the complainants obtained that title, the Land Department has no authority, either upon the ground of fraud, or mistake in the survey of the lands, to interfere with the complainant's title, or ownership or possession of the lands.

They have no more right to enter upon the lands to resurvey them than they have to enter upon and resurvey any lands owned by private parties.

Before any entry can be made upon the lands by them, under a claim that they are government lands, the patents

must be set aside, or declared void by the court in a suit instituted for that purpose on the part of the United States.

This position is clearly maintained by the decisions of this court.

Moore vs. Robbins, 96 U. S., 530 at 532, 533.
Cragin vs. Powell, 128 U. S., 691 at 699, 700.
United States vs. Schurz, 102 U. S., 378 at 401, 402.
Steel vs. Smelting Co., 106 U. S., 447 at 453, 454.
Widdicombe vs. Childers, 124 U. S., 400 at 405.
Hardin vs. Jordan, 140 U. S., 371 at 401.
Noble vs. Union River Logging Railroad, 147 U. S., 165 at 175.
Michigan Land & Lumber Co. vs. Rust, 168 U. S., 589 at 593.
McCormick Machine Co. vs. Aultman, 169 U. S., 606 at 609.
United States vs. San Jacinto Tin Co., 125 U. S., 273 at 282.
United States vs. Winona & St. Peters R. Co., 67 Fed., 948 at 959, (Ct. of Appeals.)

The defendants, in attempting to survey the lands, are acting without right and without lawful authority from any source.

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